

All Counsel listed on signature page

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

MASSIVELY PARALLEL
INSTRUMENTS, INC.,

Plaintiff,

v.

WATERS CORPORATION and
WATERS TECHNOLOGIES
CORPORATION,

Defendants.

CASE NO. 3:15-cv-01400-WHA

~~PROPOSED~~ STIPULATED ORDER RE:
DISCOVERY OF ELECTRONICALLY
STORED INFORMATION

1 Plaintiff Massively Parallel Instruments, Inc. (“Plaintiff” or “MPI”) and Defendants
2 Waters Corporation and Waters Technologies Corporation (“Defendants” or “Waters”)
3 (collectively, “the parties”) hereby stipulate as follows:

4 **1. PURPOSE**

5 This Order will govern discovery of electronically stored information (“ESI”) in this
6 case as a supplement to the Federal Rules of Civil Procedure, this Court’s Guidelines for the
7 Discovery of Electronically Stored Information, and any other applicable orders and rules. It is
8 intended to streamline ESI production to promote a “just, speedy, and inexpensive
9 determination” of this action, as required by Federal Rule of Civil Procedure 1.

10 **2. COOPERATION**

11 The parties are aware of the importance the Court places on cooperation and commit to
12 cooperate in good faith throughout the matter consistent with this Court’s Guidelines for the
13 Discovery of ESI.

14 **3. LIAISON**

15 Each Party agrees to designate an ESI Liaison who is and will be knowledgeable about
16 and responsible for discussing their respective ESI. Each ESI liaison will be, or have access to
17 those who are, knowledgeable about the technical aspects of e-discovery, including the
18 location, nature, accessibility, format, collection, search methodologies, and production of ESI
19 in this matter. The parties will rely on the ESI liaisons, as needed, to confer about ESI and to
20 help resolve disputes without court intervention. Any Party is free to change their designated
21 ESI Liaison by providing written notice to the other Party.

22 **4. PRESERVATION**

23 The parties have discussed their preservation obligations and needs and agree that
24 preservation of potentially relevant ESI will be reasonable and proportionate. The parties have
25 discussed the subject matter of potentially relevant ESI that should be preserved and have
26 taken appropriate steps to preserve such information.

27 To reduce the costs and burdens of preservation and to ensure proper ESI is preserved,
28 the parties agree that:

- 1 a) Back-up tapes or other materials retained primarily for back-up or disaster
2 recovery purposes, whether in tape, floppy disk, optical disk, or similar formats
3 are deemed not reasonably accessible under Fed. R. Civ. P. 26(b)(2)(B) and,
4 accordingly, are not subject to production unless specific facts demonstrate a
5 particular need for such evidence that justifies the burden of retrieval.
- 6 b) Similarly, in view of the needs of the case and the amount in controversy, and in
7 order to streamline the discovery process, the parties agree that the following
8 sources of ESI need not be preserved, searched or produced:
- 9 • Deleted, slack, fragmented, or other data only accessible by forensics.
 - 10 • Random access memory (RAM), temporary files, or other ephemeral
11 data that are difficult to preserve without disabling the operating system.
 - 12 • On-line access data such as temporary internet files, history, cache,
13 cookies, and the like.
 - 14 • Data in metadata fields that are frequently updated automatically, such
15 as last-opened dates.
 - 16 • Voice messages.
 - 17 • Instant messages.
 - 18 • Text messages or similar mobile message formats (e.g. iMessages).
 - 19 • Electronic mail sent to or from mobile devices (e.g., iPhone and
20 Blackberry devices), provided that a copy of such mail is routinely saved
21 elsewhere.
 - 22 • Other electronic data stored on a mobile device, such as calendar or
23 contact data or notes, provided that a copy of such information is
24 routinely saved elsewhere.
 - 25 • Logs of calls made from mobile devices.
 - 26 • Server, system or network logs.
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- Electronic data temporarily stored by laboratory equipment or attached electronic equipment, provided that such data is not ordinarily preserved as part of a laboratory report.
 - Data remaining from systems no longer in use that is unintelligible on the systems in use.
- c) Archives stored on computer servers, external hard drives, notebooks, or personal computer hard drives that are created primarily for back-up or disaster recovery purposes and not used as reference materials in the ordinary course of a party's business operations need not be searched or produced absent good cause, and further subject to the producing party's claim of undue burden or cost or other objections. No party need deviate from the practices it normally exercises with regard to preservation of such "back-up tapes or other materials retained primarily for back-up or disaster recovery purposes" that it does not otherwise exercise when not in anticipation of litigation (e.g., recycling of back-up tapes is permitted). If responsive documents are located on a centralized server or network, the producing party shall not be required to search for additional copies of such responsive documents that may be located on the personal computer, or otherwise in the possession, of individual employees absent a showing of good cause that the production of such additional copies is necessary. No party need deviate from the practices it normally exercises with regard to preservation of such "additional copies" that it does not otherwise exercise when not in anticipation of litigation (e.g., recycling of back-up tapes is permitted).

5. COST-SHIFTING

As in all cases, costs may be shifted for disproportionate ESI production requests pursuant to Federal Rule of Civil Procedure 26. Likewise, a party's nonresponsive or dilatory discovery tactics will be cost-shifting considerations. A party's meaningful compliance with

1 this Order and efforts to promote efficiency and reduce costs will be considered in cost-shifting
2 determinations.

3 **6. DOCUMENTS PROTECTED FROM DISCOVERY**

- 4 a) Pursuant to Fed. R. Evid. 502(d), the inadvertent (i.e. absent intentional waiver)
5 production of a privileged or work-product-protected document is not a waiver of
6 privilege or protection from discovery in this case or in any other federal or state
7 proceeding. For example, the mere production of privileged or work-product-
8 protected documents in this case as part of a mass production is not itself a waiver
9 in this case or in any other federal or state proceeding.
- 10 b) Communications involving trial counsel that post-date the filing of the complaint
11 need not be placed on a privilege log. Communications may be identified on a
12 privilege log by category, rather than individually, if appropriate. For each
13 document withheld or redacted, the Privilege Log shall contain the following
14 information: (i) the date of the document; (ii) the identity of all persons who
15 authored, signed or otherwise prepared the document; (iii) the identity of all persons
16 designated as addressees or copyees, including blind copyees; (iv) a description of
17 the contents of the document that, without revealing information itself privileged or
18 protected, is sufficient to understand the subject matter of the document and the
19 basis of the claim of privilege or immunity; (vi) the type or nature of the privilege
20 asserted (*e.g.*, attorney-client privilege, work product doctrine, common interest,
21 etc.); (vii) the unique document number assigned to the withheld document; and
22 (viii) the Bates numbers corresponding to the first and last page of any redacted
23 document, if the document has been assigned any such Bates numbers. Any email
24 message (whether produced individually or as part of a series or chain of emails
25 linked together by email responses and forwarding) that is withheld or redacted on
26 the grounds of privilege, immunity or any similar claim shall be logged as one
27 document and shall be identified by the top-most email in the thread that is withheld
28 or redacted (*e.g.*, if a party withholds on the basis of privilege an email thread

1 consisting of a sent email, a first reply email and a second reply email, the thread
2 shall be identified by the second reply email; if a party produces the same email
3 thread but redacts the sent email and the first reply email, the thread shall be
4 identified by the first reply email) . The parties shall not be required to log identical
5 copies of an email that is included in a thread that has been logged in accordance
6 with this Paragraph. The parties hereby agree to exchange privilege logs by no later
7 than four weeks after the document production to which each log relates.

8 c) Testifying experts shall not be subject to discovery on any draft of their reports in
9 this action and such draft reports, notes, or outlines for draft reports are also exempt
10 from production and discovery. No discovery can be taken from any non-testifying
11 expert except to the extent that the non-testifying expert has provided information,
12 opinions, or other materials to a testifying expert, who relies upon such information,
13 opinions, or other materials in forming his or her final report, or any opinion in this
14 action. No conversations or communications between counsel and any testifying or
15 non-testifying expert, including emails or correspondence, will be subject to
16 discovery unless the conversations or communications are relied upon by a
17 testifying expert in formulating his or her final report, or any opinion in this action.
18 Materials, communications, and other information exempt from discovery under
19 this paragraph shall be treated as attorney work product for the purposes of this
20 action.

21 d) If a party believes that it cannot process or produce documents or information
22 because doing so would require it to violate any foreign laws, including data
23 privacy or blocking laws, the parties agree to meet-and-confer about those issues
24 and seek guidance from the court if necessary.

25 **7. MANNER OF SERVICE**

26 The following memorializes the parties' agreement regarding electronic service
27 applicable to service occurring on or after the date this stipulation is filed. The parties will
28 serve all documents related to this Litigation by 11:59 PM Pacific Time on the day of service,

and such service shall constitute timely service on that day. Where service of is not made through the ECF, service may be made by electronic mail to counsel of record (identified below), with the filed, submitted, or produced documents attached in .pdf format. When the size of the file containing any such document(s) are too large for service by electronic mail, service may be made by hand delivery or by Federal Express (or similar means) for next day delivery, and a CD, diskette, FTP site or other means of electronically providing the documents being served shall be provided. Where service is made by via FTP or any other electronic means where the documents are immediately available to the receiving party, service shall be effective on the day access is provided to the receiving party. Where service is made by next day delivery, service shall be effective on the day received. The Parties may electronically serve large documents via an FTP site in accordance with the same rules applicable to e-mail.

All discovery requests shall be served by electronic means in .pdf format accompanied by a Word version for use by the receiving party. All responses and objections thereto (but not necessarily documents produced pursuant to any such request) shall be served by electronic mail in a searchable .pdf format.

All such electronic service under this agreement will be effective as if service had been accomplished by hand delivery, i.e., 3 days will not be added under the Federal Rules or any local rule. The parties designate the following counsel to receive documents pursuant to this stipulation:

| Party | Service by E-mail | Service by Hand |
|-------|--|---|
| MPI | tbrown@kilpatricktownsend.com mmeyer@kilpatricktownsend.com | Theodore G. Brown, III <i>tbrown@kilpatricktownsend.com</i> Matthew J. Meyer <i>mmeyer@kilpatricktownsend.com</i> Kilpatrick Townsend & Stockton, LLP 1080 Marsh Road Menlo Park, CA 94025 |

| | | |
|--------|--|--|
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|--------|--|--|

8. MODIFICATION

This Stipulated Order may be modified by a Stipulated Order of the parties or by the Court for good cause shown.

IT IS SO STIPULATED, through Counsel of Record.

Dated: November 19, 2015

Respectfully submitted,

By: /s/ Matthew J. Meyer

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MASSIVELY PARALLEL

INSTRUMENTS, INC.

1 Dated: November 19, 2015

Respectfully submitted,

2 By: /s/ David F. Kowalski
David F. Kowalski

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20 Attorneys for Defendants
WATERS CORPORATION and
21 WATERS TECHNOLOGIES
CORPORATION

22 **SIGNATURE ATTESTATION**

23 Pursuant to Civil L.R. 5.1, I hereby attest that I have obtained the concurrence in the
24 filing of this document from all the signatories for whom a signature is indicated by a
25 “conformed” signature (/s/) within this e-filed document and I have on file records to support this
26 concurrence for subsequent production for the Court if so ordered or for inspection upon request.


27 Dated: November 19, 2015

By: /s/ David F. Kowalski
David F. Kowalski

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1 **IT IS ORDERED** that the forgoing Agreement is approved.

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3 Dated: November 20, 2015.



WILLIAM ALSUP
UNITED STATES DISTRICT JUDGE

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